

FRAP 39(e)
Cost Bill

Jeffrey C. Lindquist, Case No. 05-30611-rld13

08/18/06 RLD

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The Ninth Circuit held that creditor was entitled to costs pursuant to FRAP 39(e) which were incurred in connection with a mandamus action. This court then issued a letter ruling and an order which authorized \$75.00 in costs to creditor for "transmission of the record" to the Ninth Circuit, based upon invoices for messenger services filed by the creditor in support of her request for costs. Debtor moved for reconsideration of the \$75.00 cost award for "transmission of the record" on the basis that the supporting invoice was fraudulent. The debtor filed two affidavits attesting that the invoice was fraudulent. The creditor made no response to the motion for reconsideration and provided no evidence to contradict either affidavit. The court found the invoice to be fraudulent based on the affidavits, and entered an amended order relating to costs.

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9 UNITED STATES BANKRUPTCY COURT
10 FOR THE DISTRICT OF OREGON

11 In Re:) Bankruptcy Case
12 Jeffrey C. Lindquist,) No. 05-30611-rld13
13 Debtor.) MEMORANDUM OPINION

14 I have been asked to revisit the issue of costs with respect to
15 the Ninth Circuit mandamus action ("Mandamus Action"), this time at the
16 request of Debtor Jeffrey C. Lindquist ("Dr. Lindquist"), by the filing
17 of "Debtor's Motion for Reconsideration of Order Re: Supplemental Costs
18 (9th Cir. Case 06-70465)" ("Motion for Reconsideration") (#430 on the
19 docket). Because the filings made with respect to the issue of costs in
20 connection with the Mandamus Action are numerous, I will set out the
21 history of this particular dispute in detail.

22 A. Prior Cost Bill Proceedings

23 On May 26, 2006, the Ninth Circuit entered an order granting,
24 in part, Eleanor Lindquist's ("Ms. Lindquist") petition for a writ of
25 mandamus and other relief ("Mandamus Order") (#381 on the docket). The
26 primary subject of the Mandamus Action was an order which I had entered

1 on June 17, 2005, relating to Ms. Lindquist's motion for relief from the
2 automatic stay. The Bankruptcy Court received the Mandamus Order on
3 May 31, 2006, and it was entered on the docket in this case on that date.

4 On June 6, 2006, Ms. Lindquist filed her Cost Bill. See
5 "Petitioner Eleanor Lindquist's Bill of Costs Pursuant to Federal Rules
6 of Appellate Procedure, Rule 39(e) and Federal Rules of Bankruptcy [sic]
7 Rule 8014 for Cost as the Prevailing Party on a Writ of Mandamus to the
8 United States Court of Appeals for the Ninth Circuit" (#405 on the
9 docket). Because the Mandamus Order did not provide for an award of
10 costs to Ms. Lindquist, the Cost Bill was forwarded to the Ninth Circuit
11 for direction (#383 on the docket). By its order entered June 28, 2006
12 ("Mandamus Cost Order") (#404 on the docket), the Ninth Circuit granted
13 Ms. Lindquist's request for costs, granted costs pursuant to Fed. R. App.
14 P. 39(d) in the amount of \$118.30, and referred the parties to the
15 bankruptcy court for taxing of "any costs of transcripts, transmission of
16 the record and/or the filing fee" pursuant to Fed. R. App. P. 39(e). The
17 Bankruptcy Court received the Mandamus Cost Order on or about July 3,
18 2006, and it was entered on the docket in this case on that date.

19 The parties received the Mandamus Cost Order prior to the time
20 it was received by the Bankruptcy Court. On June 29, 2006,
21 Dr. Lindquist's counsel advised me by letter (#402 on the docket) that
22 they intended to file a response to the Cost Bill on behalf of
23 Dr. Lindquist. The objection ("Cost Bill Objection") was filed on
24 June 30, 2006 (#403 on the docket). I then prepared my "Order Awarding
25 Costs (9th Cir. Case 06-70465)" ("Bankruptcy Cost Order") (#407 on the
26 docket), the complete text of which reads:

1 The Ninth Circuit has ruled in its discretion pursuant to Fed
2 R. App. P. 39(a)(4) that Ms. Lindquist is a prevailing party in
3 Case No. 06-70465 and is entitled to costs as appropriate
4 pursuant to Fed. R. App. P. 39(e). I have reviewed the Cost
Bill submitted by Ms. Lindquist, together with the objection
filed by Dr. Lindquist, and I award costs to Ms. Lindquist,
payable by Dr. Lindquist, as follows:

5 1. Reporters Transcript. I allow costs to Ms. Lindquist in
6 the amount of \$260.00 as requested.

7 2. Transmission of the Record. Subject to paragraph 7, below,
8 I disallow costs for this category on the basis that Ms.
Lindquist has provided no supporting documentation for this
expense.

9 3. Court Fees. As reflected by the Order of the Ninth Circuit
10 Court of Appeals entered January 30, 2006, Ms. Lindquist was
11 allowed to proceed in forma pauperis. See page 2 of #260 on
12 the docket of this bankruptcy case. Ms. Lindquist cannot
recover a cost she did not pay. Accordingly, I disallow the
costs in this category.

13 4. Mailing Costs. Subject to paragraph 7, below, I disallow
14 costs for this category on the basis that Ms. Lindquist has
provided no supporting documentation for this expense.

15 5. Court Records (Pacer Costs). Subject to paragraph 7,
16 below, I disallow costs for this category on the basis that
Ms. Lindquist has provided no supporting documentation for this
expense.

17 6. Preparation of the Record. Subject to paragraph 7, below,
18 I disallow costs for this category on the basis that Ms.
Lindquist has provided no supporting documentation for this
expense.

19 7. Ms. Lindquist may request reconsideration of the
20 disallowance of costs in paragraphs 2, 4, 5, and 6 above by
21 filing, within 10 days of the date this order is entered, a
22 motion for reconsideration together with an affidavit and
supporting documentation to establish the amount of costs
incurred within each category.

23 Between the time the Bankruptcy Cost Order was prepared and the
24 time it was entered by the Clerk of the Court, Dr. Lindquist withdrew the
25 Cost Bill Objection. See #406 on the docket.

26 The Bankruptcy Cost Order was entered on July 5, 2006. On

1 July 6, 2006, Ms. Lindquist filed an objection to the Bankruptcy Cost
2 Order (see "Petitioner Eleanor Lindquist's Objection to the Bankruptcy
3 Court's Refusal to Award the Listed Costs and Considering Debtor's
4 Objection to the Cost Bill Which Was Withdrawn for Violating Rule 9011"
5 (#412 on the docket)). On July 11, 2006, Ms. Lindquist filed a motion
6 for reconsideration of the Bankruptcy Cost Order (see "Motion for
7 Reconsideration of Cost Bill or in the Alternative for an Order
8 Certifying the Issue to the Ninth Circuit" (#413 on the docket)).
9 Finally, on July 17, 2006, Ms. Lindquist filed documentation
10 ("Supporting Documentation") to support her Cost Bill (see "Petitioner
11 Eleanor Lindquist's Lodging of Documentation of Petitioner's Cost Bill
12 Pursuant to the Order of the Bankruptcy Court's Determination That All
13 Cost Bills Must Submit Actual Documentation Prior to the Award of Costs
14 to the Prevailing Party" (#420 on the docket)). The Supporting
15 Documentation increased the amount Ms. Lindquist sought as costs in
16 connection with the Mandamus Action from \$993.50 to \$1,810.38.

17 Thereafter, I reviewed the Supporting Documentation and
18 articulated in detail my findings ("July 21, 2006 Findings") (#425 on the
19 docket) with respect to Ms. Lindquist's entitlement to costs under Fed.
20 R. App. P. 39(e). I determined, based upon the Supporting Documentation,
21 that Ms. Lindquist was entitled to an additional \$9.50 representing the
22 cost of transcripts, and \$75.00 representing the cost of "transmission of
23 the record" pursuant to Fed. R. App. P. 39(e)(1). My analysis with
24 respect to the cost of transmitting the record is set out verbatim as
25 follows:

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1 Cost Item 2. The Supporting Documentation reflects that
2 Ms. Lindquist is seeking an award of costs as reimbursement for
3 messenger services incurred for delivering documents to the
4 Ninth Circuit Court of Appeals. She provided documentation to
5 support a charge of \$75.00 for each of the following dates:
6 January 24, 2006, April 7, 2006, and May 1, 2006. Fed. R. App.
7 Proc. 39(e)(1) allows an award of costs for "transmission of
8 the record." The record on appeal is a defined term under the
9 Federal Rules of Appellate Procedure. Specifically, Fed. R.
10 App. Proc. 10 provides:

(a) Composition of the Record on Appeal. The following items
constitute the record on appeal:

- (1) the original papers and exhibits filed in the
district court;
- (2) the transcript of proceedings, if any; and
- (3) a certified copy of the docket entries
prepared by the district clerk.

11 It does not appear from my review of the docket in the Mandamus
12 Action that an official record on appeal was prepared and
13 transmitted from the clerk's office. Nevertheless I assume
14 that with her original petition in the Mandamus Action Ms.
15 Lindquist attached copies of court documents which appear to
16 have substituted for a "record on appeal." (See Fed. R. App.
17 Proc. 21(a)(2)(C), which requires that the petition for a writ
18 of mandamus "include a copy of any order or opinion or parts of
19 the record that may be essential to understand the matters set
20 forth in the petition.") Accordingly, I will allow the
21 transmittal costs in the form of the messenger charges for
22 delivery to the Ninth Circuit of the original petition on
January 24, 2006, in the amount of \$75.00. However, with
respect to the April 7, 2006 delivery, which coincides with the
filing of Ms. Lindquist's reply brief in the Mandamus Action,
and the May 1, 2006 delivery, which coincides with the filing
of Ms. Lindquist's opposition to Dr. Lindquist's motion to
strike, I find that these were Ms. Lindquist's pleadings filed
in the Mandamus Action, which do not constitute the "record on
appeal" pursuant to Fed. R. App. Proc. 10(a) or otherwise.
Accordingly, there is no authority in the rules for an award of
these costs.

23 Based upon the July 21, 2006 Findings, on July 21, 2006, I
24 entered the "Order Re Supplemental Costs (9th Cir. Case 06-
25 70465)" ("Supplemental Cost Order") (#427 on the docket). In the
26 Supplemental Cost Order, I awarded Ms. Lindquist \$84.50 in additional

1 costs in the Mandamus Action.

2 B. The Current Dispute

3 On the same date that the Supplemental Cost Order was entered,
4 Dr. Lindquist filed the Motion for Reconsideration which is the motion
5 currently pending before me.¹

6 Notwithstanding the pendency of the Motion for Reconsideration,
7 on July 31, 2006, Ms. Lindquist filed her "Notice of Appeal from Denying
8 [sic] Costs from Order Granting Writ of Mandamus" ("Notice of Appeal")
9 (#434 on the docket). This Notice of Appeal does not divest me of
10 jurisdiction to rule on the Motion for Reconsideration. See Fed. R.
11 Bankr. P. 8002(b).

12 The Motion for Reconsideration relies upon the arguments
13 contained in the Debtor's Response, "particularly the arguments contained
14 therein concerning the veracity of the purported invoices for deliveries
15 (by 'Western Messenger [sic] Services') to the Ninth Circuit." Motion
16 for Reconsideration, paragraph 5. Because I did not award Ms. Lindquist
17 most of the costs addressed in the Debtor's Response, I intend to limit
18 the scope of the Motion for Reconsideration to those costs I actually
19 awarded in the Supplemental Cost Order, which provides in relevant part:

20 "2. Petitioner is awarded the following additional costs:

21
22 ¹ Dr. Lindquist actually filed three documents that day. The first
23 two were "Debtor's Response to Eleanor Lindquist's 'Motion for
24 Reconsideration of Cost Bill or in the Alternative for an Order
25 Certifying the Issue to the Ninth Circuit'" ("Debtor's Response") (#428
26 on the docket), and the "Affidavit of Jeff Payne" ("Payne Affidavit")
(#429 on the docket). When Dr. Lindquist realized that the Supplemental
Cost Order already had been entered at the time the Debtor's Response and
Payne Affidavit were filed, he then filed the Motion for Reconsideration.

Reporters transcript \$ 9.50
Transmission fees 75.00
Total additional costs: \$84.50"

1. Reconsideration of Cost Award for "Reporters Transcript"

With respect to the \$9.50 award for "Reporters transcript", the July 21, 2006 Findings provide:

Cost Item 1. The Supporting Documentation establishes that Ms. Lindquist paid \$269.50 to her attorney, Mr. Stuart Brown, for the preparation of a transcript. The Cost Bill previously had requested \$260.00, which the Cost Order allowed. Fed. R. App. Proc. 39(e)(2) allows an award of costs for "the reporter's transcript, if needed to determine the appeal." Although the Supporting Documentation does not establish that the transcript for which Ms. Lindquist paid Mr. Brown was in connection with the Mandamus Action, and I note that Ms. Lindquist previously stated that Mr. Brown represented her only in connection with the pending motion to dismiss and motion for contempt in the main bankruptcy case, nevertheless I will allow the Cost Order to stand in connection with this Cost Item and will award the additional \$9.50 to Ms. Lindquist in a supplemental cost order.

The Motion for Reconsideration and the related Debtor's Response do not oppose the \$9.50 supplemental award for "Reporters transcript" specifically.² Neither did Dr. Lindquist oppose the \$260.00 awarded for "Reporters transcript" in the original Cost Order. Accordingly, I will deny the Motion for Reconsideration with respect to the "Reporters transcript."

2. Reconsideration of Costs for Transmission Fees

Dr. Lindquist raises a more serious issue with respect to the transmission fees awarded in the Supplemental Cost Order. The Motion for

² The Motion for Reconsideration, by the incorporated Debtor's Response, seeks a blanket denial of all costs based on the court's "equitable powers to deny all costs due to Mrs. Lindquist's deliberate submission of unrecoverable and/or non-existent costs." Debtor's Response, page 6.

1 Reconsideration, through the Debtor's Response, alleges in essence that
2 Ms. Lindquist filed fraudulent invoices³ to support her request for these
3 costs. These allegations are supported both by the Payne Affidavit,
4 filed in conjunction with Debtors' Response, and by the "Affidavit of
5 Evan Magayanes" ("Magayanes Affidavit") attached to "Debtor's Additional
6 Submission in Support of Motion for Reconsideration of Order Allowing
7 Costs" filed August 2, 2006 (#438 on the docket).

8 The Magayanes Affidavit is the sworn statement of Evan
9 Magayanes, an employee of Western Messenger working in the account
10 department. Ms. Magayanes reviewed copies of the invoices Ms. Lindquist
11 submitted to this court on July 17, 2006, as part of her Supporting
12 Documentation, and states that the invoices were not issued by Western
13 Messenger. She further states:

14 1. that Western Messenger has no account either for
15 Eleanor Lindquist or Howard Hershops,

16 2. that the computer accounting system used by Western
17 Messenger, which permits her to track every address from which
18 the company has ever made a pick up or delivery, does not show
19 that Western Messenger has ever picked up any documents from
20 540 Fathom Drive, San Mateo, California, which is the address
21 listed on the invoices Ms. Lindquist filed with this court, and

22 3. that the charges reflected on the invoices
23 Ms. Lindquist filed with this court are not consistent with the
24

25 ³ Copies of the "Western Messenger Services" invoices filed as part
26 of the Supporting Documentation are attached as Exhibit A to this
Memorandum Opinion.

1 charges that would be assessed by Western Messenger for the
2 deliveries reflected in those invoices, and

3 4. that there is no business known as "Western Messenger
4 Services" located at 70 Columbia Sq. in San Francisco,
5 California.

6 Significantly, the Payne Affidavit and the Magayanes Affidavit
7 are uncontradicted in the record. I, therefore, find that the "Western
8 Messenger Services" invoices submitted by Ms. Lindquist in her Supporting
9 Documentation filed July 17, 2006, are fraudulent. Accordingly, I will
10 grant the Motion for Reconsideration as it relates to the Transmission
11 Fees in the amount of \$75.00 awarded in the Supplemental Cost Order.

12 3. Conclusion

13 I will enter an Amended Supplemental Cost Order to reflect my
14 ruling as stated above with respect to the Motion for Reconsideration.

15 ###

16 cc: Ann K. Chapman
17 Eleanor Lindquist
18 Brian D. Lynch, Trustee
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COST ITEM 2

**TRANSMISSION OF THE
RECORD
DOCUMENTATION
\$225.00**

70 Columbia Sq.
San Francisco, Ca 94102

415 487 4100

**WESTERN
MESSANGER
SERVICES**

Date Jan. 24, 2006

PICK UP AT: 540 Fathom Drive San Mateo, California 6 Copies

**Deliver to: U.S. Court of Appeals For the Ninth Circuit 95 7th Street
San Francisco prior to 5:00 P.M.**

Drop of endorsed copy stamped filed by clerk.

Will pay fee on pick up

\$75.00

And return

70 Columbia Sq.
San Francisco, Ca 94102

415 487 4100

**WESTERN
MESSANGER
SERVICES**

Date April 7, 2006

PICK UP AT: 540 Fathom Drive San Mateo, California 6 Copies

**Deliver to: U.S. Court of Appeals For the Ninth Circuit 95 7th Street
San Francisco prior to 5:00 P.M.**

Drop of endorsed copy stamped filed by clerk.

Will pay fee on pick up	\$75.00
And return	

70 Columbia Sq.
San Francisco, Ca 94102

415 487 4100

**WESTERN
MESSANGER
SERVICES**

Date May 1, 2006

PICK UP AT: 540 Fathom Drive San Mateo, California 6 Copies

**Deliver to: U.S. Court of Appeals For the Ninth Circuit 95 7th Street
San Francisco prior to 5:00 P.M.**

Drop of endorsed copy stamped filed by clerk.

Will pay fee on pick up

\$75.00

And return

Exhibit A
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